

United States District Court
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

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| KENNETH LEO BUHOLTZ, AS GUARDIAN AD LITEM, ON BEHALF OF HIS MINOR CHILDREN JCG & LSB; | § § § Civil Action No. 4:16-CV-00747 § (Judge Schell/Judge Johnson) |
| v. | § § § |
| BART CARROLL, ET AL.; | § |

**MEMORANDUM ADOPTING REPORT AND
RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

Came on for consideration the report of the United States Magistrate Judge in this action, this matter having been heretofore referred to the Magistrate Judge pursuant to 28 U.S.C. § 636. On April 26, 2017, the report of the Magistrate Judge (Dkt. #38) was entered containing proposed findings of fact and recommendations that Defendants' Motions to Dismiss (Dkts. #24-25) be granted. The Magistrate Judge recommended *pro se* Plaintiff's claims be dismissed because all of the elements of res judicata were met, and because Plaintiff failed to state a claim upon which relief can be granted. Additionally, on May 3, 2017, the Magistrate Judge entered an order (Dkt. #40) denying Plaintiff's request for the court to appoint an attorney *ad litem* for his children. Plaintiff first argues that the Magistrate Judge erred in finding that the Eastern District of Virginia dismissed Plaintiff's § 1983 claims with prejudice in a prior lawsuit (Dkt. #43 at 3). Plaintiff asserts that because the order from the Eastern District of Virginia did not specifically provide that his § 1983 claims were dismissed with prejudice, the doctrine of res judicata does not apply. *Id.* However, under Federal Rule of Civil Procedure 41(b), unless the dismissal order states otherwise, an involuntary dismissal operates as an adjudication on the merits. Plaintiff's federal claims were previously dismissed in the Eastern District of Virginia, and because the Eastern

District of Virginia did not provide otherwise, the dismissal was an adjudication on the merits. *Buholtz v. Carroll*, 2016 U.S. Dist. LEXIS 5570, at *6 (E.D. Va. Jan. 15, 2016) (“Accordingly, Buholtz has failed to allege any cognizable § 1983 claims against Defendants. Therefore, Butholz’s § 1983 claims will be dismissed as frivolous.”). Thus, Plaintiff’s objection is overruled.

As to Plaintiff’s objection regarding dismissal under Rule 12(b)(6), Plaintiff reiterates the same arguments articulated in his responses to Defendants’ motions to dismiss (Dkts. #33-34). Plaintiff has failed to show a violation of a constitutional right. The Due Process Clause does not require a State to provide its citizens with particular protective services, and a State’s failure to protect an individual against *private* violence does not violate the Due Process Clause. *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 197 (1989). Additionally, Plaintiff has not suggested or demonstrated a violation of the Equal Protection Clause. Although Plaintiff has alleged his children were violated or wronged by the children’s mother, he has failed to allege any violation of his children’s constitutional rights by a State actor. Thus, this objection is overruled.

Plaintiff finally objects to the Magistrate Judge denying Plaintiff’s request to appoint an attorney *ad litem* for his children (Dkt. #43 at 2-3). The court construes this objection as a motion to reconsider. *See* 28 U.S.C. § 636(b)(1)(a). In order to succeed on a motion to reconsider, Plaintiff must show that the Magistrate Judge’s order is clearly erroneous or contrary to law. *Id.* After reviewing Plaintiff’s objections, the court finds the Magistrate Judge’s order was not clearly erroneous or contrary to law. Thus, Plaintiff’s final objection is overruled.

Having received the report of the United States Magistrate Judge, having considered each of Plaintiff’s timely filed objections (Dkt. #43), and having conducted a de novo review, the court is of the opinion that the findings and conclusions of the Magistrate Judge are correct and adopts the Magistrate Judge’s report (Dkt. #38) as the findings and conclusions of the court.

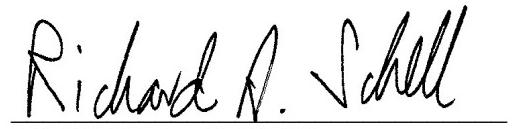
The court further finds that the Magistrate Judge's order denying Plaintiff's request to appoint an attorney *ad litem* for his children was not clearly erroneous or contrary to law.

It is, therefore, **ORDERED** that Defendants' Motions to Dismiss (Dkt. #24-25) are **GRANTED**, and Plaintiff's claims against all Defendants are **DISMISSED** with prejudice under the doctrine of res judicata and Rule 12(b)(6).

All relief not previously granted is **DENIED**.

IT IS SO ORDERED.

SIGNED this the 15th day of May, 2017.



RICHARD A. SCELL
UNITED STATES DISTRICT JUDGE